In the Supreme Court

OF THE

United States

OCTOBER TERM, 1930

No. 34

PUGET SOUND PULP AND TIMBER COMPANY,
a corporation,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit.

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In the Supreme Court
OF THE
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October Term, 1960

No.

Puget Sound Pulp and Timber Company,
a corporation,
Petitioner,

vs.

Commissioner of Internal Revenue,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above case on April 12, 1960, ruling that it had no jurisdiction to review the decision of the Tax Court of the United States in the same case.

OPINION BELOW.

The opinion of the Tax Court (R. 118-1 to 118-55)[1] is reported at 30 T.C. 398. The opinion of the Court of Appeals (R. 274) is reported at 277 F.(2d) 803 and is set forth in the Appendix at pages i and ii.

JURISDICTION.

The judgment of the Court of Appeals was made and entered on April 12, 1960 (R. 273), and is set forth in the Appendix at page iii. A petition to said Court for a rehearing was duly filed and was denied on May 23, 1960 (R. 274) without opinion. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1) (1958).

QUESTIONS PRESENTED.

1. Was the Court of Appeals correct as a matter of law in its conclusion that Congress could and did merely by including a finality of decision clause in a statute (Section 732(c) of the Internal Revenue Code of 1939) giving jurisdiction to an administrative tribunal to decide certain tax relief cases (arising under Section 722 of said Code) exclude absolutely a right of judicial review, even in a case, such as this case, where the administrative tribunal by its actions and its decision has deprived the person

[1] Hereinafter the Tax Court's Findings of Fact and Opinion in its decision the transcription of which starts on page 118 of the Transcript of Record, will be cited as "R. Op. " followed by the page number in the decision.

affected thereby of property without due process of law in violation of the 5th Amendment to the United States Constitution.

2. Was the Court of Appeals correct as a matter of law in refusing to review the decision of the Tax Court in this case notwithstanding the taxpayer (petitioner herein) assigned as an error in its appeal that the action and decision of the Tax Court was so arbitrary and erroneous as to deprive the taxpayer of property without due process of law in violation of the 5th Amendment to the Constitution of the United States.

3. Was the Court of Appeals correct as a matter of law in failing to acknowledge that Section 732(c) merely limits the scope of judicial review and does not exclude it absolutely.

STATUTES INVOLVED.

The Statutes, and the Regulation of the Commissioner of Internal Revenue and Treasury Department thereon, involved in this proceeding, are set forth in the Appendix at pages iv to x.

STATEMENT.

This case involves the wartime excess profits tax law applicable to the taxable calendar years 1940, 1941 and 1942, and in particular Section 722 of that law (Section 722 of the Internal Revenue Code of 1939) which provides for a method of relief from an excessive and discriminatory tax. Under the excess profits tax law a 95% tax

was imposed on profits in excess of credit based on a normal profit. The measure of the normal profit insofar as this case is concerned was the average net income earned in the "base period" years 1935 to 1939. If certain circumstances or certain events, generally referred to as abnormalities, existed or occurred in those base period years which resulted in a depression of business or earnings in those years, then the taxpayer was entitled under Section 722 to reconstruct the average base period net income to arrive at a fair and just amount representing normal earnings for the period. If the reconstruction enabled the taxpayer to have a sufficient excess profits tax credit to result in a revised excess profits tax less than the amount it had paid, it was entitled to a refund of the excess paid over the revised tax.

Puget Sound Pulp and Timber Company, the taxpayer and petitioner herein, was engaged in the manufacture and sale of unbleached sulphite pulp. (R. Op. 2.) It filed a petition with the Tax Court (R. 6-23) contending that its excess profits taxes imposed for the years 1940, 1941 and 1942 were excessive and discriminatory and therefore it was entitled to relief and reduction of the tax under the provisions of Section 722 of the Internal Revenue Code of 1939. (R. 7, 8.)

The taxpayer contended that because of certain abnormalities in its earnings for the base period years 1935 to 1939 inclusive, its average base period net income was below an amount which would be a fair and just amount representing normal earnings for that period, and it requested that the abnormalities be corrected and that it be

given the right to use a constructive average base period net income as provided for in said Section 722, which would reflect a fair and just amount for that period.

As grounds for its claim under Section 722, the Company pointed out that in 1937 it lost a customer in Japan as the result of the effects of war conditions in that country, and that this customer had been purchasing over half of the Company's output and sales of its product, and because of the loss of this customer its business was depressed in the base period years. (R. Op. 44, 45.) The taxpayer pointed out that the regulations of the Commissioner of Internal Revenue recognized that a right to relief exists in situations where (1) there was "a diminution in a taxpayer's production caused by a low demand for the product of the taxpayer resulting from the effects of war conditions in the country in which the taxpayer sold a substantial portion of its production. . . ." Regulations 112, Sec. 35.722-3(a) (set forth in Appendix), and, (2) where the taxpayer's business was depressed in a base period year because of the loss of a principal customer. (Regulations 112, Sec. 35.722-3(b) set forth in Appendix.)

The Tax Court made extensive findings which showed that war conditions existed in Japan (R. Op. 24-27) and that the taxpayer's loss of its customer there was occasioned by an aggravation of these conditions when the Japanese Army invaded Shanghai in 1937 (R. Op. 24-27), but concluded that the taxpayer's loss of this business could be attributed not to the war conditions but rather to economic conditions preceding and leading up to the

war and which might have been one of the causes of the war conditions (R. Op. 48-49), and thereupon the Tax Court decided that the taxpayer was not eligible for relief under Section 722 on the alleged ground of having lost substantial business due to the effects of war conditions in the country in which that business had been conducted. The Tax Court made no finding or specific determination at all on the second ground presented by the taxpayer, namely, that its business was depressed during the base period because of the loss of a principal customer, notwithstanding the fact that the Tax Court did find that the Japanese customer had been purchasing over half of the taxpayer's production of pulp (R. Op. 22) and that a very substantial amount of business which had been contracted for was suddenly lost when the Japanese Government prohibited the importation of the pulp shortly after the Shanghai invasion. (R. Op. 24, 25.)

The ultimate conclusion of the Tax Court was that the taxpayer did not qualify or become eligible for relief on these asserted grounds (R. Op. 49, 55), and therefore was not entitled to reconstruct its base period income or to have a recomputation of its excess profits tax liability on a basis which would allow for a correction for the alleged abnormalities.

The taxpayer appealed to the Court of Appeals for the Ninth Circuit, assigning as errors committed by the Tax Court:

1. The Tax Court's conclusion that the taxpayer was not eligible for relief on the grounds asserted was arbitrary, in conflict with its own findings of fact, and based on an erroneous construction of Section 722. (R. 125-127.)

2. The Tax Court's conclusion that the loss of the Japanese business was not due to the effect of war conditions in Japan, was arbitrary and in conflict with its own findings of fact. (R. 125, 126.)

3. The Tax Court's failure to make any ultimate finding or conclusion as to the taxpayer's claim that the loss of a principal customer entitled it to relief notwithstanding the Tax Court by its findings of fact acknowledged in effect that the Japanese customer was a principal customer, was arbitrary and in violation of the provisions of Section 1117 of the Internal Revenue Code of 1939, which requires that the Tax Court make findings on issues presented to it. (R. 126, 127.)

4. That the conclusions of the Tax Court in these particulars denied the taxpayer due process of law in violation of the 5th Amendment to the Constitution of the United States, and resulted in the taxpayer being deprived of property in violation of said constitutional provision. (R. 125-127.)

The Court of Appeals for the Ninth Circuit concluded that it had no jurisdiction to review the decision of the Tax Court because of the specific prohibition contained in Section 732(c) of the Internal Revenue Code of 1939. (R. 272.) The Court of Appeals interpreted that section as containing an absolute exclusion of Appellate Court jurisdiction in a Tax Court case involving Section 722. It was the view of the Court of Appeals that since Section 722 was a relief provision, Congress could declare exactly how it was to be administered even to the extent of completely excluding all appellate review of a decision of an administrative tribunal in such cases, regardless of

whether the taxpayer's constitutional rights had been violated by the administrative tribunal in its proceedings and in arriving at its decision.

The taxpayer, the petitioner herein, believes that the Fifth Amendment to the United States Constitution guarantees that it shall not be deprived of its property, whether that property be tangible property in its possession or property to which it is entitled under a relief statute, without due process of law, and the Appellate Court was wrong in refusing to review the Tax Court decision to determine whether the taxpayer's constitutional right in that regard had been violated. By its dismissal of the appeal for lack of jurisdiction, the Court of Appeals refused to hear the appeal and gave no consideration whatever to the grounds on which the appeal was taken. The petitioner herein, by the filing of this Petition for Certiorari, is asking this Honorable Court to protect its constitutional rights and to require the Court of Appeals to review the record and to determine whether those rights have been violated and to take such action as may be appropriate to assure compliance with the constitutional provisions.

REASONS FOR GRANTING THE WRIT.

I. THE DECISION OF THE COURT OF APPEALS IN THIS CASE IN HOLDING THAT SECTION 732(c) OF THE INTERNAL REVENUE CODE OF 1939 PROHIBITS A REVIEW OF THE DECISION OF THE TAX COURT NOTWITHSTANDING THE TAXPAYER MAY HAVE BEEN DEPRIVED OF ITS CONSTITUTIONAL RIGHTS, IS IN CONFLICT WITH THE DECISION OF THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT IN THE CASE OF PACKER PUBLISHING COMPANY v. COMMISSIONER, 211 F(2d) 612 (1954).

In this case the Court of Appeals for the Ninth Circuit held that it had no authority or jurisdiction to review the Tax Court decision because of the prohibition contained in Section 732(c) of the Internal Revenue Code of 1939, notwithstanding issues as to violation by the Tax Court of the taxpayer's constitutional rights are raised and are involved. (R. 271, 272.) The Court was influenced in this view by its belief that Congress may preclude judicial review of determinations by administrative agencies on matters considered under statutes which have for their purpose the granting of some kind of relief (R. 272), and the Court concluded that Section 732(c) is an expression of the intent of Congress to do just that on cases involving the relief provisions of Section 722 of the Internal Revenue Code of 1939. Under the Court's decision it makes no difference whether the administrative agency, in the course of its proceeding, violated the constitutional rights of the taxpayer—judicial review is absolutely prohibited.

In *Packer Publishing Company v. Commissioner of Internal Revenue*, 17 T.C. 882 (1951), the Tax Court held that where the taxpayer was obtaining relief under Section 722 the Tax Court would not consider whether the taxpayer was entitled to relief under Section 711 as well. The taxpayer appealed from the Tax Court decision to the

United States Court of Appeals for the Eighth Circuit. The Appellate Court not only took jurisdiction, notwithstanding Section 732(c) relates to review of cases arising under Section 711 as well as Section 722, but in its decision (211 F.(2d) 612) reversed the Tax Court and remanded the case to the Tax Court with directions to determine whether relief is appropriate in addition to that granted under Section 722.

As to the effect that both Sections 711 and 722 being relief statutes had on the right of the Tax Court to have exclusive say as to their construction and application, the Court stated:

> "Granting that both sections (711 and 722) are relief provisions and are to be strictly construed to the end that the relief intended should not be extended beyond the clear intent of the law as written, yet such construction should not be unreasonable or arbitrary." (211 F.(2d) 612 at 616.)

In recognizing the right to review and correct any unreasonable and arbitrary action of the Tax Court notwithstanding the matters at issue arise under relief statutes, the conclusions of the Court of Appeals for the Eighth Circuit are definitely in conflict with the views of the Court of Appeals of the Ninth Circuit in this case that judicial review is prohibited absolutely no matter what the nature of the issues raised on appeal might be, and even though those issues involve a violation by the Administrative Agency of the petitioner's constitutional rights.

In the appeal to the Ninth Circuit in this case, the petitioner complained that the action of the Tax Court was

arbitrary and capricious, (1) in making conclusions that the petitioner did not suffer loss of business because of the effects of war conditions in conflict with the findings of fact therein, (2) in failing to make specific findings and conclusions on the contentions raised by the petitioner that the loss of its principal customer entitled it to relief under the law which, as interpreted by the Commissioner's Regulations (Reg. 112, Section 35.722-3(b)) specifically provides for eligibility for relief under such circumstances, and (3) in its construction of Section 722 inconsistent with the interpretation of the Statute by the said Regulations which, particularly in a subject-matter such as this, should have the force and effect of law. Petitioner raised the contention on appeal that the action of the Tax Court was so arbitrary in this connection as to constitute a violation of this petitioner's right to due process of law, and also a deprivation of its property without due process of law. Notwithstanding these contentions the Ninth Circuit in effect held that it was prohibited from reviewing the case under Section 732(c) even though the petitioner's contentions might be valid. The Eighth Circuit did take jurisdiction in the *Packer Publishing Company* case, supra, to correct arbitrary action of the Tax Court and the erroneous construction by the Tax Court of Section 722, so there is obviously a conflict between these two Circuits as to the extent to which judicial review is limited by Section 732(c).

II. THE DECISION OF THE COURT OF APPEALS IN THIS CASE, IN HOLDING THAT SECTION 732(c) OF THE INTERNAL REVENUE CODE OF 1939 PROHIBITS A REVIEW OF THE DECISION OF THE TAX COURT NOTWITHSTANDING THE TAXPAYER MAY HAVE BEEN DEPRIVED OF ITS CONSTITUTIONAL RIGHTS, IS IN CONFLICT WITH THE DECISIONS OF THIS COURT IN THE CASES OF ST. JOSEPH STOCK YARDS CO. v. U. S., 298 U.S. 38, BRIDGES v. WIXON, 326 U.S. 135, AND ESTEP v. U. S., 327 U.S. 114, TO THE EFFECT THAT THERE IS ALWAYS A RIGHT OF REVIEW OF AN ADMINISTRATIVE DECISION OR ACTION SO ARBITRARY AS TO VIOLATE CONSTITUTIONAL SAFEGUARDS OR RIGHTS.

As hereinbefore stated the Court of Appeals for the Ninth Circuit held in this case that it had no jurisdiction to review the decision of the Tax Court notwithstanding constitutional questions of due process are raised. The fact that the case involves rights under a relief statute should not change or render inapplicable the constitutional protection against depriving the taxpayer of its property without due process of law. The right which the relief statute affords and to which the taxpayer is entitled is definitely property and arbitrary action by the administrative body in depriving the taxpayer of the benefits of the Statute would be a violation of the Fifth Amendment to the United States Constitution.

In the case of *St. Joseph Stock Yards Co. v. U. S.* (1936), 298 U.S. 38, a case involving a rate determination of the Secretary of Agriculture which under the Statute was to be final, the Supreme Court in holding that the Secretary's decision could be reviewed on appeal, pointed out that even a Legislature's actions are subject to judicial scrutiny and determination in order to prevent the transgressions of Constitutional prohibitions against the deprivation of property without due process of law.

so that when the Legislature delegates powers to an administrative agency that agency must be subject to the same limitations. The Court stated (298 U.S. at pages 51-52):

> "The legislature cannot preclude that scrutiny and determination by any declaration or legislative finding. . . . Nor can the legislature escape the constitutional limitation by authorizing its agent to make findings that the Agent has kept within that limitation. . . . But to say that their findings of fact may be made conclusive where constitutional rights have been invaded, is to place those rights at the mercy of administrative officials and seriously to impair the security inherent in our judicial safeguards."

Justice Brandeis in his concurring opinion expresses this principle in this language:

> "The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied; and whether the proceeding in which facts were adjudicated was conducted regularly. To that extent, the person asserting a right, whatever its source, should be entitled to the independent judgment of a court on the ultimate question of constitutionality." (298 U.S. at p. 84.)

The decision of the Court of Appeals for the Ninth Circuit that judicial review may be completely prohibited notwithstanding constitutional questions are involved, is definitely in conflict with the decision of this Court in the *St. Joseph Stock Yards Co.* case just cited and the tenor of the language contained therein.

The decision of this Court in *Estep v. U. S.* (1946), 327 U.S. 114, and the language used by Justice Murphy

in his concurring opinion, also emphasizes the supremacy of protection of constitutional rights to any statutory provision as to finality of decisions of administrative agencies.

In the case of *Harry Bridges v. I. F. Wixon* (1946), 326 U.S. 135, involving the validity of an order of deportation by the Attorney General under a statute which prescribed that the decision of the administrative tribunal was to be final, the Court of Appeals for the Ninth Circuit took jurisdiction of an appeal, *Bridges v. Wixon*, 144 F.(2d) 927, pointing out that:

> "Thus the Court has no power derived from Congress to review or to enquire into the truth of the charge against the alien, nor into the manner in which the decision has been reached by the Attorney General. *The right of the Court to consider the validity of the order of deportation at all is derived directly from the Fifth Amendment to the Constitution of the United States, which prohibits a deprivation of liberty or property without due process of law.*" (Italics ours.) 144 F.(2d) 927, 931.

This Court also reviewed the case (326 U.S. 135) and its decision again recognizes the supremacy of the protection of constitutional rights against finality of the decisions of the administrative agencies.

The decision of the Court of Appeals in this case to the effect that it has no jurisdiction to review, notwithstanding constitutional issues involving due process are involved, is definitely in conflict with the above cited decisions of this Court.

III. THE DECISION OF THE COURT OF APPEALS IN THIS CASE IN HOLDING THAT SECTION 732(c) OF THE INTERNAL REVENUE CODE OF 1939 COMPLETELY PRECLUDES ANY JUDICIAL REVIEW OF A TAX COURT DECISION IN A CASE INVOLVING SECTION 722, IS IN CONFLICT WITH THE DECISION OF THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT IN THE CASE OF PACKER PUBLISHING COMPANY, SUPRA, AND WITH THE DECISIONS OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT IN THE CASES OF GEORGE KEMP REAL ESTATE CO. v. COMM., 205 F.(2d) 236, STERN AND STERN TEXTILES, INC. v. COMM., 263 F.(2d) 538, AND HEADLINE PUBLICATIONS, INC. v. COMM., 263 F.(2d) 541, AND WITH THE DECISION OF THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT IN THE CASE OF H. FENDRICH, INC. v. COMM., 192 F.(2d) 916, WHICH CASES APPEAR TO HOLD THAT SECTION 732(c) DOES NOT PRECLUDE JUDICIAL REVIEW ABSOLUTELY BUT MERELY LIMITS THE SCOPE OF REVIEW, AND ALSO IN CONFLICT IN PRINCIPLE WITH THE DECISION OF THIS COURT IN U. S. v. CALIFORNIA EASTERN LINES (1955), 348 U.S. 351.

In this case, the Court of Appeals for the Ninth Circuit decided in effect that since Section 732(c) completely precludes judicial review of a Section 722 case under no circumstance could the Appellate Court review such a case.

In the *Packer Publishing Co.* case, supra, the Appellate Court indicated that it could review any question raised on the appeal other than one relating to the actual computation of the constructive base period credit. It said in explaining its review of the Tax Court decision:

> "That decision involved solely the judicial construction of the statute. It did not involve to any extent the determination of whether the formula of the statute, applied to the facts by the experts, justified or did not justify relief."

To the same effect is the decision of the Court of Appeals for the Second Circuit in *U. S. Rubber Company v.*

Commissioner, 274 F.(2d) 307 (1960). Even though the Court concluded in that case that it did not have jurisdiction to review a matter involving "the proper computation of the taxpayer's constructive average base period net income" where the Tax Court had recognized the taxpayer's right to a reconstruction and the appeal raised a question as to the computation of the reconstruction, the Court, however, pointed out that its decision was not in conflict with its previous decisions in *Kemp*, supra, *Stern*, supra, and *Headline Publications, Inc. v. Commissioner*, 263 F.(2d) 541, in which it did review the Tax Court decisions. The Court therefore was specifically recognizing that there could be instances where it would have authority to review cases involving the application of Section 722. The *Kemp* and *Stern* cases, supra, involved decisions of the Tax Court as to whether the taxpayers were estopped from obtaining relief under Section 722, and the *Headline* case involved the question of whether the taxpayer's claim for relief was barred by the Statute of Limitations. Regardless of the nature of the issue on review, the point made here is that all these cases arose in the Tax Court on claims for relief under Section 722 and the Tax Court decisions were reviewed by the U. S. Court of Appeals for the Second Circuit. In taking jurisdiction the Second Circuit was of a view definitely in conflict with the decision of the Ninth Circuit in this case that Section 732(c) prohibits any review of a Section 722 case regardless of the issues raised on appeal.

The Seventh Circuit, too, took jurisdiction to review in the *H. Fendrich, Inc.* case, supra, where the Tax Court

refused, in a Section 722 case, to consider other issues relating to the excess profits tax credit.

As hereinbefore pointed out the Eighth Circuit was of the view in the *Packer Publishing Co.* case, supra, that the Appellate Court could take jurisdiction even to determine whether the Tax Court's interpretation of Section 722 was correct.

In *U. S. v. California Eastern Line*, 348 U.S. 351, where the Tax Court determined that a contract was not renegotiable in a case involving the Renegotiation Law which specified that the Tax Court decision in cases involving renegotiable profits should be final, the Appellate Court refused to review. (214 F.(2d) 635.) This Court held that review was proper to determine whether the Tax Court was correct in concluding that the contract was nonrenegotiable which was a question of law apart from the question of the amount of renegotiable profits. This decision, in principle, casts doubt upon the decision of the Court of Appeals for the Ninth Circuit in this case that Section 732(c) prohibits any review of a case involving the construction of Section 722 or of the legal conclusions reached by the Tax Court apart from the determination of the dollar amount of relief.

CONCLUSION.

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Dated, San Francisco, California,
August 2, 1960.

Respectfully submitted,

GEORGE H. KOSTER,
Attorney for Petitioner.

LEONARD S. ZIPPERIAN,
Of Counsel.

(Appendices A, B and C Follow.)

Appendice

Appendix A

OPINION OF THE COURT OF APPEALS

United States Court of Appeals
for the Ninth Circuit

Puget Sound Pulp & Timber Co., a corporation, Petitioner, vs. Commissioner of Internal Revenue, Respondent.	No. 16,252 April 12, 1960

Petition to Review a Decision of the Tax Court
of the United States

Before: ORR, BARNES and MERRILL, Circuit Judges

PER CURIAM:

Petitioner filed claims for excess profits tax relief under Section 722 of the Internal Revenue Code of 1939.

The respondent Commissioner contends that review of this case is precluded by Section 732(c) of the 1939 Code, reading as follows:

> "(c) *Finality of determination*—If in the determination of the tax liability under this subchapter the determination of any question is necessary solely by reason of section 711(b)(1)(H), (J), (J) or (K), section 721, or section 722, the determination of such question shall not be reviewed or redetermined by any court or agency except the Tax Court."

Appendix C

STATUTES AND REGULATIONS.

STATUTES.

EXTRACTS FROM THE INTERNAL REVENUE CODE OF 1939.

"§722. General relief—Constructive average base period net income.

(a) General rule.—In any case in which the taxpayer establishes that the tax computed under this subchapter (without the benefit of this section) results in an excessive and discriminatory tax and establishes what would be a fair and just amount representing normal earnings to be used as a constructive average base period net income for the purposes of an excess profits tax based upon a comparison of normal earnings and earnings during an excess profits tax period, the tax shall be determined by using such constructive average base period net income in lieu of the average base period net income otherwise determined under this subchapter. In determining such constructive average base period net income, no regard shall be had to events or conditions affecting the taxpayer, the industry of which it is a member, or taxpayers generally occurring or existing after December 31, 1939, except that, in the cases described in the last sentence of section 722(b)(4) and in section 722(c), regard shall be had to the change in the character of the business under section 722(b)(4) or the nature of the taxpayer and the character of its business under section 722(c) to the extent necessary to establish the normal earnings to be used as the constructive average base period net income.

(b) Taxpayers using average earnings method. The tax computed under this subchapter (without the benefit of this section) shall be considered to be excessive and discriminatory in the case of a taxpayer entitled to use the excess profits credit based on income pursuant to section 713, if its average base period net income is an inadequate standard of normal earnings because—

(1) In one or more taxable years in the base period normal production, output, or operation was interrupted or diminished because of the occurrence, either immediately prior to, or during the base period, of events unusual and peculiar in the experience of such taxpayer,

(2) The business of the taxpayer was depressed in the base period because of temporary economic circumstances unusual in the case of such taxpayer or because of the fact that an industry of which such taxpayer was a member was depressed by reason of temporary economic events unusual in the case of such industry."

"732. Review of abnormalities by Board of Tax Appeals

(a) Petition to the Board.—If a claim for refund of tax under this subchapter for any taxable year is disallowed in whole or in part by the Commissioner, and the disallowance relates to the application of section 711(b)(1)(H), (I), (J), or (K), section 721, or section 722, relating to abnormalities, the Commissioner shall send notice of such disallowance to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the ninetieth day) the taxpayer may file a

petition with the Board of Tax Appeals for redetermination of the tax under this subchapter. If such petition is so filed, such notice of disallowance shall be deemed to be a notice of deficiency for all purposes relating to the assessment and collection of taxes or the refund or credit of overpayments.

(b) Deficiency found by Board in case of claim.—If the Board finds that there is no overpayment of tax in respect of any taxable year in respect of which the Commissioner has disallowed, in whole or in part, a claim for refund described in subsection (a) and the Board further finds that there is a deficiency for such year, the Board shall have jurisdiction to determine the amount of such deficiency and such amount shall, when the decision of the Board becomes final, be assessed and shall be paid upon notice and demand from the collector.

(c) Finality of determination.—If in the determination of the tax liability under this subchapter the determination of any question is necessary solely by reason of section 711(b)(1)(H), (I), (J), or (K), section 721, or section 722, the determination of such question shall not be reviewed or redetermined by any court or agency except the Board.

(d) Review by special division of Board.—The determinations and redeterminations by any division of the Board involving any question arising under section 721(a)(2)(C) or section 722 shall be reviewed by a special division of the Board which shall be constituted by the Chairman and consist of not less than three members of the Board. The decisions of such special division shall not be reviewable by the Board, and shall be deemed decisions of the Board."

"§1117. Reports and decisions

(a) Requirement.—A report upon any proceeding instituted before the Tax Court and a decision thereon shall be made as quickly as practicable. The decision shall be made by a judge in accordance with the report of the Tax Court, and such decision so made shall, when entered, be the decision of the Tax Court.

(b) Inclusion of findings of fact or opinions in report.—It shall be the duty of the Tax Court and of each division to include in its report upon any proceeding its findings of fact or opinion or memorandum opinion. The Tax Court shall report in writing all its findings of fact, opinions and memorandum opinions."

"§1141. Courts of review

(a) The courts of appeals shall have exclusive jurisdiction to review the decisions of the Tax Court, except as provided in section 1254 of title 28 of the United States Code, in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury; and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 1254 of title 28 of the United States Code."

REGULATIONS.

Treasury Regulations 112, promulgated under the Internal Revenue Code of 1939:

"*Sec. 35.722-3. Determination of excessive and discriminatory tax; taxpayer entitled to excess profits credit based on income.*—The excess profits tax, computed without regard to the provisions of Section 722, for any taxable year shall be considered to be excessive and discriminatory in the case of a taxpayer entitled to use the excess profits credit based on income pursuant to section 713 (or pursuant to Supplement A if the taxpayer is an acquiring corporation under Supplement A) if its actual average base period net income is an inadequate standard of normal earnings for one or more of the following reasons—

(a) *Interruption or diminution of normal production, output, or operation in the base period.*—If the taxpayer establishes that in one or more taxable years in its base period normal production, output, or operation was interrupted or diminished because of the occurrence either immediately prior to, or during the base period, of events unusual and peculiar in the experience of the taxpayer, the average base period net income shall be considered to be an inadequate standard of normal earnings. . . . Except as otherwise described in this paragraph, such events would include floods, fires, explosions, strikes and other such exceptional and uncommon circumstances hindering production, output, or operation; such events would not include economic maladjustments such as higher prices of materials, labor, capital, or any other agent of production, usually low selling price of the product of taxpayer, or unusually low physical volume of sales

owing to low demand for such product or for the output of the taxpayer. However, a diminution in the taxpayer's production caused by a low demand for the product of the taxpayer resulting from the effects of war conditions in the country in which the taxpayer sold a substantial portion of its products may be an event which might form the basis of a claim for relief under section 722(b)(1)."

* * * * *

(b) *Business depression in base period on account of temporary economic circumstances.*—If the taxpayer establishes that its business was depressed in the base period because of temporary economic circumstances unusual in the case of such taxpayer or because of the fact that an industry of which the taxpayer was a member was depressed by reason of temporary economic circumstances unusual in the case of such industry, the average base period net income of the taxpayer shall be considered to be an inadequate standard of normal earnings.

* * * * *

An example illustrating section 35.722-3(b) might be a taxpayer which for a long period of years conducted business with one customer which it lost during the base period because such customer decided to manufacture for itself the product it had formerly bought from the taxpayer. The taxpayer would be compelled to develop a new market. The average earnings of the taxpayer for the period of time during which the taxpayer was engaged in obtaining new customers would not represent an adequate standard of its normal earnings and would be sufficient cause for the establishment of a constructive average base period net income under section 722."

Treasury Department Bulletin on Section 722 (November, 1944):

PART I

INTRODUCTION

* * * * *

(E) *Concept of Normal Earnings.*

* * * * *

"Whether events or circumstances are to be considered abnormal must be left for determination in each particular case. In making this determination, the frequency and regularity of the event or circumstances and its relation to the nature and extent of the taxpayer's operations must be considered. No conditions induced by war can be considered to be normal whether such conditions were manifested before or after December 31, 1939."

COPY

No. 310

In the Supreme Court of the United States

OCTOBER TERM, 1960

PUGET SOUND PULP & TIMBER CO., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The findings of fact and opinion of the Tax Court R. Op. 2–55)[1] are reported at 30 T.C. 398. The opinion of the Court of Appeals (Pet. App. A i–ii) is reported at 277 F. 2d 803.

JURISDICTION

The judgment of the Court of Appeals was entered on April 12, 1960. (Pet. App. B iii.) A petition for rehearing was denied on May 23, 1960. (Pet. 2.)

[1] These references are to pages of the Tax Court's slip opinion, copies of which were inserted in the printed record in the court below between page 117 and page 119. (See Pet. 2.)

The petition for a writ of certiorari was filed on August 10, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals—by reason of the provision of Section 732(c) of the 1939 Code that the Tax Court's determination of any question made "necessary solely by reason of * * * section 722 * * * shall not be reviewed or redetermined by any court or agency except the Tax Court"—lacked jurisdiction to review, for alleged inconsistency or lack of findings, the Tax Court's denial of relief under Section 722(b)(1) or Section 722(b)(2).

STATUTE INVOLVED

Internal Revenue Code of 1939:

> SEC. 732 [As added by Sec. 9, Excess Profits Tax Amendments of 1941, c. 10, 55 Stat. 17]. REVIEW OF ABNORMALITIES BY THE TAX COURT OF THE UNITED STATES.
>
> * * * * *
>
> (c) *Finality of Determination.*—If in the determination of the tax liability under this subchapter the determination of any question is necessary solely by reason of section 711(b)(1)(H), (I), (J), or (K), section 721, or section 722, the determination of such question shall not be reviewed or redetermined by any court or agency except the Tax Court. [26 U.S.C. 1952 ed. 732(c).]

STATEMENT

The taxpayer petitioned the Tax Court for a redetermination of the Commissioner's disallowance of its applications for relief under Section 722 of the 1939 Code as to its excess profits taxes [2] for the years 1940, 1941 and 1942. (R. 6–29; R. Op. 2–55.) The only issues presented to the Tax Court for decision related exclusively to the taxpayer's applications for relief under Section 722. (R. Op. 2, 44–45.) After a trial on the merits, the Tax Court, upon the basis of its extensive findings of fact (R. Op. 2–44) and opinion (R. Op. 44–45), decided (R. Op. 54–55; R. 119) that the taxpayer was not entitled to any relief or refund of excess profits tax under Section 722 for the years in question.

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[2] Briefly, under the Second World War excess profits tax law, Section 710 *et seq.* of the 1939 Code, a tax was imposed upon corporate profits in excess of a certain norm or level, called the "excess profits credit," deemed to represent the taxpayer's "normal" profits and computed upon either the taxpayer's average earnings during the "base period" (1936–1939) under Section 713 or upon the basis of invested capital under Section 714, whichever resulted in the lesser tax. However, in the case of certain enumerated "abnormalities" or conditions, relief from the resultant tax was granted primarily by Section 722—under which the tax would be computed upon the basis of a "constructive average base period net income," to be used if the taxpayer could establish that its base period income was not normal for any of the reasons specified in the statute and if it established "what would be a fair and just amount representing normal earnings." Section 722(a) of the 1939 Code, as added by Section 201 of the Second Revenue Act of 1940, c. 757, 54 Stat. 974, and amended by Section 222 of the Revenue Act of 1942, c. 619, 56 Stat. 798.

Review in the court below was sought by the taxpayer only with respect to two issues:[3] (1) As to its right to relief under Section 722(b)(1) upon the ground that its base period production or operation was diminished by reason of its loss of Japanese orders for pulp in 1937 and 1938, allegedly as the result of war conditions within the meaning of Section 722(b)(1) of the 1939 Code and Section 35.722-3 (a) of Treasury Regulations 112—with respect to which the taxpayer contended that the Tax Court's ultimate finding or conclusion was inconsistent with its evidentiary findings; and (2) as to its right to relief under Section 722(b)(2) upon the ground that its business was depressed during the base period by reason of its loss of Japanese orders for pulp, which assertedly constituted the loss of a principal customer within the meaning of Section 722(b)(2) of

[3] No review was sought in the court below (cf. R. 125-127, 257-259 and Pet. 6-7) as to other issues, as to which the Tax Court concluded: (1) that the taxpayer was not entitled to relief under Section 722(b)(2) upon the ground that the business of its industry was depressed during the base period by reason of the alleged dumping of pulp by foreign producers in the domestic market (R. Op. 50), (2) that the taxpayer did qualify for relief under Section 722(b)(1) by reason of its loss of Chinese orders (R. Op. 49), and (3) that the taxpayer qualified for relief under Section 722(b)(4) by reason of an increase in capacity for production resulting from the construction of a new mill (R. Op. 50): as to the latter two issues, the Tax Court further concluded that the constructive increase in base period earnings attributable to the loss of Chinese orders and to the increased capacity resulting from the new mill was not sufficient to provide an "excess profits credit" which would exceed the credit allowed to the taxpayer on the invested capital method under Section 714 (R. Op. 55), and that hence the taxpayer was not entitled to any relief.

the Code and Section 35.722-3(b) of Regulations 112—with respect to which the taxpayer contended that the Tax Court had failed to make any ultimate findings. (R. 125–127, 257–259.)

The court of appeals, *per curiam,* declined to review, because of the prohibition of Section 732(c). (Pet. App. A i–ii.)

ARGUMENT

1. Since the determination of the issues with respect to which review was sought was plainly made "necessary solely by reason of * * * section 722," the court of appeals was clearly correct in holding that review was precluded by Section 732(c) of the Internal Revenue Code of 1939, *supra,* p. 2.

In declining review in the instant case, the Ninth Circuit merely followed its recent decision in *Helms Bakeries* v. *Commissioner,* 263 F. 2d 642, certiorari denied, 360 U.S. 903, rehearing denied, 361 U.S. 857,[1] as well as its earlier decision in *James F. Waters, Inc.* v. *Commissioner,* 160 F. 2d 596, certiorari denied, 332 U.S. 767.

2. This case presents the same basic question, as to the scope and effect of the prohibition of Section

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[1] By that decision the Ninth Circuit expressly overruled its earlier holding in *Helms Bakeries* v. *Commissioner,* 236 F. 2d 3—thereby removing the only divergence from the otherwise uniform pattern of appellate court decisions on this question.

Actually, review in the present case was sought at a time, in 1958, when the first *Helms Bakeries* decision apparently represented the governing rule in the Ninth Circuit, and the petition for review was based upon the theory of reviewability announced in the first *Helms Bakeries* decision. (R. 6, 120–128.)

732(c) against appellate review in Section 722 cases, as was presented in five cases in which petitions for certiorari were denied at the last two terms of this Court. *Brown Paper Mill Co.* v. *Commissioner,* 255 F. 2d 77 (C.A. 5), certiorari denied, 358 U.S. 906, rehearing denied, 358 U.S. 942; *Crowell-Collier Pub. Co.* v. *Commissioner,* 259 F. 2d 860 (C.A. 2), certiorari denied, 358 U.S. 928; *Bradford Machine Tool Co.* v. *Commissioner,* 260 F. 2d 950 (C.A. 6), certiorari denied, 359 U.S. 909; *Helms Bakeries* v. *Commissioner, supra; United States Rubber Co.* v. *Commissioner,* 274 F. 2d 307 (C.A. 2), certiorari denied, 363 U.S. 827.

3. The review sought in this case—for alleged inconsistencies in, or lack of, findings (Pet. 6–7, 11)—was substantially identical to that sought in *Helms Bakeries, Crowell-Collier Pub. Co.,* and *Brown Paper Mill Co.* The assertions of deprivation of property without due process of law (Pet. 2–3, 7, 11) and violation of "constitutional rights" (Pet. 9, 10, 12–14) are really premised upon nothing more than the alleged inconsistencies or lack of findings.[5] These

[5] Since relief under Section 722 is granted as a matter of legislative grace, various challenges (see Pet. 9, 12–14) to the power of Congress to deny appellate review of Tax Court decisions on such relief questions have been repeatedly rejected by appellate courts beginning with the *Waters* case—the first case in which such review was sought—and this Court has repeatedly denied certiorari.

allegations are substantially similar to those urged in support of the petitions in *Brown Paper Mill, Crowell-Collier,* and *Helms Bakeries,* and no additional constitutional problem is presented by the petition in this case.

4. There is no conflict, as claimed (Pet. 15–17), with *Packer Pub. Co.* v. *Commissioner,* 211 F. 2d 612 (C.A. 8); *George Kemp Real Estate Co.* v. *Commissioner,* 205 F. 2d 236 (C.A. 2), certiorari denied, 346 U.S. 876; *Stern & Stern Textiles, Inc.* v. *Commissioner,* 263 F. 2d 538 (C.A. 2), certiorari denied, 361 U.S. 831; *Headline Publications, Inc.* v. *Commissioner,* 263 F. 2d 541 (C.A. 2); *H. Fendrich, Inc.* v. *Commissioner,* 192 F. 2d 916 (C.A. 7); and *United States* v. *California Eastern Line,* 348 U.S. 351. The *California Eastern Line* case involved a statute basically different from Section 732(c). In *Packer Pub. Co.,* notwithstanding certain somewhat confusing statements in its opinion, all that the Eighth Circuit did was to remand the case to the Tax Court to consider the right to relief under Section 711(b)(1)(J)—which the Tax Court had not passed upon apparently because the issue had not been timely raised. All of the other cases involved review with respect to matters other than the right to relief under Section 722 itself.

CONCLUSION

The decision of the Court of Appeals is correct, there is no conflict of decisions, and the case presents no question warranting review by this Court. The petition should therefore be denied.

Respectfully submitted.

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SEPTEMBER 1960.